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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE SAGASTUME,

Defendant and Appellant.

B291148

Los Angeles County  
Super. Ct. No. KA113478

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Conviction affirmed; remanded with directions.

Lori A. Quick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant Jose Sagastume pled no contest to three counts of lewd acts on his three stepchildren. In accordance with the plea agreement, the trial court sentenced Sagastume to 12 years in the state prison. The court ordered Sagastume to submit to AIDS testing under Penal Code section 1202.1.<sup>1</sup> On appeal, Sagastume argues the evidence was insufficient to constitute the required “probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV ha[d] been transferred” from him to the victims. (§ 1202.1, subd. (e)(6)(A)(iii).) The Attorney General concedes the point, and asks us to remand the case “to afford the prosecution an opportunity to offer additional evidence supporting the trial court’s order of AIDS testing, if any exists.” The parties also agree the trial court must correct an error in the minute order. We otherwise affirm Sagastume’s conviction.<sup>2</sup>

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<sup>1</sup> Statutory references are to the Penal Code.

<sup>2</sup> In his notice of appeal filed in propria persona, Sagastume purports to raise other grounds for appeal, including the trial court’s denial of post-sentencing motions he filed for discovery and to dismiss the case under section 995. Sagastume did not obtain a certificate of probable cause as to these matters. On July 24, 2018, the Administrative Presiding Justice of this court issued an order that Sagastume’s appeal is limited to issues that do not require a certificate of probable cause.

## FACTS AND PROCEDURAL BACKGROUND

### 1. *Sagastume's lewd acts on his three stepchildren*<sup>3</sup>

When K.<sup>4</sup> was 11½ or 12 years old, she came to the United States to live with her mother and her mother's husband, Jose Sagastume. K. was in the sixth grade. At first, K. viewed Sagastume as the father figure she had never had.

One night around midnight K. awoke to find Sagastume in bed with her—a bed she usually shared with her mother. K. and Sagastume were face to face. K. “started to feel like a bumping between his penis and [her] vagina.” Sagastume's left arm was “hugging” K.e, touching the back of her shoulder. K. turned her back to Sagastume. She saw his pajamas were unbuttoned “and his penis was out.” It was erect. K. pretended to be asleep until Sagastume got up and left the room.

Two to three months later, when K. was 12, she awoke very early—at 4:00 or 5:00 a.m.—when she felt movement. Sagastume was in bed with K. and he had two fingers in her vagina. Sagastume was rubbing her clitoris. K. tried to remove Sagastume's hand but he resisted. She pinched his wrist and he then removed his hand. Sagastume told K.: “If you tell that to your mother, she's not going to believe you. Because if she does believe you, I am going to kill her and kill your siblings

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<sup>3</sup> Because the case resolved before trial, we take the facts from the preliminary hearing testimony.

<sup>4</sup> We refer to the minor victims by the initials of their first names to protect their privacy. (Cal. Rules of Court, rule 8.90(b)(4).)

because I am Kaibil, and I'm an asshole.”<sup>5</sup> Sagastume told K. he “had been trained to kill.”

When K. was 13 or 14 and in the eighth grade, she caught Sagastume lying on the floor outside the bathroom, looking under the door while she was taking a shower. Sagastume also grabbed K.'s breasts and buttocks 15 to 20 times when she was 13 or 14. He also showed her pornographic images on his phone 10 to 15 times.

K.'s younger brother A.Y. came to live with his mother and Sagastume when he was about seven or eight years old. After school one afternoon when A.Y. was about 11 or 12, he was sitting on a large pillow in front of the television. Sagastume “arrived” and “then . . . placed his hand on [A.Y.'s] private part” over his P.E. clothes. “It was a grab.” Sagastume told A.Y. that A.Y. “had a big dick.” A.Y. grabbed Sagastume's hand and pushed it away.

K. and A.Y.'s younger brother S. was visiting one day. He was seven years old. S. was coming out of the bathroom, wearing a towel. Sagastume grabbed S.'s private parts.

## **2. *The charges, plea disposition, and sentence***

Following the preliminary hearing, the People filed an information charging Sagastume with three counts of lewd act on a child under 14, one for each of his stepchildren (counts 1, 4, and 6). The People also charged Sagastume with forcible lewd act on a child (count 2) and lewd act on a child age 14 (count 3), both against victim K. On May 8, 2018, Sagastume entered into

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<sup>5</sup> The Spanish language interpreter explained the Kaibiles “are special forces in the military that have been trained by the U.S. Army.”

a plea agreement with the People. Sagastume pled no contest to counts 1, 4, and 6. In accordance with the agreement, the court sentenced Sagastume to 12 years in the state prison. The court imposed the upper term of eight years on count 1, plus one-third the midterm (six years) of two years each on counts 4 and 6, to run consecutively to count 1. The court ordered the Los Angeles County Sheriff's Department to take blood or saliva samples from Sagastume and test them for HIV under section 1202.1.

### DISCUSSION

Section 1202.1 requires a defendant convicted of lewd or lascivious conduct with a child to submit to a blood or saliva test “for evidence of antibodies to the probable causative agent of acquired immunodeficiency syndrome (AIDS)” “if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim.” (§ 1202.1, subd. (a), (e)(6)(A)(iii).) Sagastume contends there was insufficient evidence before the trial court to constitute probable cause.<sup>6</sup> The Attorney General concedes Sagastume's contention “appears meritorious.” The Attorney General therefore suggests “the appropriate remedy is to remand the matter to the trial court to give the prosecution the opportunity to offer evidence, if any exists, to support such an order.” We agree (*People v.*

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<sup>6</sup> The parties agree Sagastume may challenge the AIDS test order on appeal even though he did not object in the trial court. Involuntary testing is “strictly limited by statute” and conditioned on a probable cause finding; “[w]ithout evidentiary support the order is invalid.” (*People v. Butler* (2003) 31 Cal.4th 1119, 1123.)

*Butler, supra*, 31 Cal.4th at p. 1129) and remand the case for further proceedings on this point.

Finally, the parties also agree there is an error in the minute order of the sentencing. As noted, the plea agreement provided for the sentences on counts 4 and 6 to be one-third the midterm of six years—that is, two years each—to be served *consecutively* to the eight years imposed on count 1 (the principal term). The trial court correctly pronounced the sentence. The abstract of judgment also correctly reflects the sentences on counts 4 and 6 are two years each, “1/3 consecutive.” But the minute order incorrectly states, “The sentence imposed in count 4 is to run concurrent to the sentence imposed in count 1.” On remand, the trial court is to correct the minute order dated June 15, 2018 to reflect that the sentence on count 4 is consecutive to the sentences on counts 1 and 6.

### **DISPOSITION**

We affirm Jose Sagastume's conviction. We remand the case for the trial court to (1) permit the People, if they wish, to present evidence sufficient to constitute the probable cause required by Penal Code section 1202.1 for HIV testing, and (2) correct the minute order of the sentencing.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

DHANIDINA, J.